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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PORSHA MEOLI, ALAN CHERRIGAN, JAEL SALAS, et al., **Plaintiffs and Respondents,** **v.** **AT&T WIRELESS SERVICES, INC., et al.,** **Defendants and Appellants.**	**A106061, A106340, A106341** **(Alameda County Super. Ct. No. JCCP 4332)**

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*), the Court of Appeal held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. The trial court in the present case relied upon *Szetela* to rule that the arbitration clause at issue here is likewise unconscionable. Recognizing that the issue is pending before our Supreme Court, we will not follow *Szetela* and will conclude instead that under the facts in the present case the contractual ban on class-wide arbitration is not unduly one-sided, harsh, or in violation of public policy.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were initially brought against defendant AT&T Wireless and other providers of wireless telephone service, challenging the "early termination fee"

charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

First, Porsha Meoli and two other named plaintiffs brought a class action in Alameda County to challenge both the early termination fee and AT&T's locked handsets that preclude the use of competitors' networks. Plaintiffs alleged that the early termination fee constituted an unlawful liquidated damages provision and thereby violated the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and the Consumers' Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). Second, Diane Tucker sued in Orange County under similar theories as a private attorney general under the UCL. And, in the third lawsuit, Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the CLRA. These three lawsuits were coordinated with other lawsuits pending against other wireless service providers.

Customers who purchase a mobile telephone for use on the AT&T wireless system are subject to the terms and conditions of a wireless service agreement that comes with the phone. The customer has 30 days in which to review the terms and to cancel the agreement. Over the years, the exact language of the wireless service agreement has been altered, and there are three variations at issue in the lawsuits here.[2] All three versions contain an arbitration clause calling for the arbitration of all disputes arising out of the wireless service agreement. All three versions provide that the arbitration is to be governed by the wireless industry arbitration rules of the American Arbitration

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1 The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court* , review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 200 (S113699).

2 In 2001 and 2002, AT&T Wireless customers received a "welcome guide" with the telephone that contained the terms and conditions of the wireless service. The plaintiffs in the Meoli lawsuit received a welcome guide. Beginning in 2003, customers received a wireless service agreement. The plaintiffs in the Marlowe lawsuit received a wireless service agreement.

Association. Moreover, under all three versions the customer retains the right to bring an action in small claims court notwithstanding the agreement to arbitrate all disputes.

The arbitration clause allows only individual claims to be heard in arbitration. The early versions of the wireless service agreement provided that the arbitrator could not award relief on a class-wide or representative basis. The later version is even more explicit: "[A]ny arbitration will be conducted on an individual basis and not on a consolidated, class-wide, or representative basis."

The latest version of the arbitration agreement sets up a three-tiered system for allocation of costs. If the customer's claim is for less than $1,000, the customer must pay a fee of $25, and AT&T will pay the balance of administrative fees and costs. If the customer's claim is between $1,000 and $75,000, then the customer must share in the costs of arbitration, but need pay no more than the equivalent court filing fee. And, if the claim is in excess of $75,000, then all administrative costs and expenses will be divided equally. The earlier versions had only a two-tiered system: $25 fee for claims under $1,000 and equal division of costs for claims above $1,000.

AT&T initially petitioned to compel arbitration in the Meoli lawsuit and, after the Marlowe and Tucker lawsuits were filed, petitioned in those cases as well. AT&T further requested that any arbitration conducted be limited to arbitration of individual claims. Plaintiffs opposed the petition, arguing, that the arbitration clause was unconscionable in various particulars, including the ban on class-wide relief. The trial court rejected plaintiffs' other arguments on the unconscionability of the arbitration clause , but the trial court agreed that the ban on class-wide arbitration is unconscionable and invalid under the Court of Appeal decision in *Szetela, supra,* 97 Cal.App.4th 1094. The court denied AT&T's petition to compel arbitration. By way of dictum, the court noted that because the arbitration clause is not otherwise unconscionable, if *Szetela* were not to be followed, arbitration would be compelled on an individual basis and not as a class or representative claim. AT&T filed its notice of appeal from the order denying arbitration.

Meanwhile, two additional lawsuits were filed against AT&T challenging the early termination fee--one by Alan Cherrigan on behalf of himself and the general public

under the UCL and the second by Jael Salas. Those two lawsuits were added to the coordination proceeding, and by stipulation the order denying arbitration was applied to them. AT&T then filed notices of appeal on those cases. We consolidated the appeals pursuant to stipulation. Plaintiffs in the Meoli lawsuit as well as plaintiff Tucker have filed a protective cross-appeal to challenge the trial court's rejection of plaintiffs' other claims of unconscionability of the arbitration clause.

DISCUSSION

I. Injunctive Relief

All the plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 [UCL]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082 [CLRA].) AT&T conceded below that the claims for injunctive relief were not arbitrable, and on appeal AT&T acknowledges that this court is bound to follow *Cruz* and *Broughton.* We will, therefore, affirm the trial court's denial of AT&T's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Tucker

With one exception, plaintiffs subject to AT&T's petition to compel arbitration are parties to the arbitration clause in AT&T's wireless service agreement.[3] The one exception is plaintiff Diane Tucker, who is not and never has been a subscriber to

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[3] We find it significant that of the eight named plaintiffs in the Marlowe lawsuit, AT&T sought to compel arbitration only as to plaintiffs Marlowe and Lowinger, who are subscribers to AT&T Wireless. In declining to compel arbitration as to the Marlowe plaintiffs who are not AT&T customers—even though those plaintiffs also sued on behalf of the general public under the UCL --AT&T has taken a position that is inconsistent with its argument with respect to Tucker that a nonparty can be compelled to arbitrate.

AT&T's wireless service. She brought suit against AT&T solely as a private attorney general under the UCL for the benefit of the general public.[4]

Plaintiff Tucker is before us in another appeal on a lawsuit brought in San Mateo County against a different wireless telephone service provider. (*Tucker v. Cingular Wireless,* A106671 [challenging rates].) We apply the same reasoning here as in that related appeal and conclude that plaintiff Tucker cannot be compelled to arbitrate.

By statute, an order compelling arbitration is warranted when "an agreement to arbitrate the controversy exists" and "a party thereto refuses to arbitrate such controversy." (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245; see also *Marcus & Millichap Real*

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4 At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel . . . or any [qualified] city attorney . . . or by *any person acting for the interests of* itself, its members or *the general public*." (Bus. & Prof. Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Diane Tucker is entitled to pursue her claims under the UCL is not an issue that is cognizable on AT&T's petition to compel arbitration. AT&T's assertions that Diane Tucker now lacks standing and that her claims should be entirely dismissed may be raised in the trial court by an appropriate motion.

Estate Investment Brokerage Co. v. Hock Investment Co. (1998) 68 Cal.App.4th 83, 88-89.)[5]

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plans, Inc., supra,* 47 Cal.App.4th at pages 242-245, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a preexisting relationship between the nonsignatory and a party to the agreement.[6] (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff Tucker and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Tucker to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is "closely related to the

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5 A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705.)

6 Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274 [arbitration clause in construction agreement incorporated into surety bond].)

contractual relationship." (*Id.* at pp. 587, 588; *Lu v. Dryclean-U.S.A. of California, Inc.*, (1992) 11 Cal.App.4th 1490, 1493.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano, supra,* 92 Cal.App.4th at p. 990 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at p. 320, fn. 7.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof. Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof. Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-1152.) As the Supreme Court explained, "The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well." (*Id.* at p. 1152; italics added.) In the present case, plaintiff Tucker is not an actual direct victim of AT&T Wireless's early termination fee and is acting only as a private attorney

general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 4, *ante*.) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class Arbitration

(1) Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[7] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ. Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc.*, *supra,* 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ. Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851*; Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ. Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.) Here, AT&T argued below and continues to assert that the provision is an integral part of the arbitration agreement and cannot be severed.

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The

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[7] The statutory reference to grounds for revocation of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to rescind the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

procedural element focuses on the way in which the disputed provision was presented--i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The substantive element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056.)

We agree with the trial court's conclusion that the arbitration agreement, included in the box along with the telephone, was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra,* 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1533-1534.) The more difficult question is whether the ban on class arbitration is substantively unconscionable.

That issue was addressed in *Szeleta, supra,* 97 Cal.App.4th 1094. There the plaintiff was a credit card holder who alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class

treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szeleta* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money, such as the $29 sought by Szeleta. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szeleta, supra*, 97 Cal.App.4th at p. 1101.)

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra,* 24 Cal.4th at pp. 117-121.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id*. at pp. 120-121 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at p. 1073 [allowing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc., supra,* 93 Cal.App.4th at p. 855 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].)[8]

In the present case, the ban on class-wide arbitration does tend to favor AT&T. The obvious effect is to limit the scope of potential damages that AT&T would face in

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[8] Not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536; accord, *Armendariz, supra,* 24 Cal.4th at p. 117.)

class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. Class actions through litigation are necessarily precluded by the agreement to arbitrate. The limitation is only on the breadth of the arbitration proceeding--i.e., the manner in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela.* The arbitration clause here expressly permits the customers to obtain relief in small claims court.[9] Moreover, the cost to the customer is limited to $25 on claims under $1,000; AT&T will pay all other administrative costs and fees. In contrast to the credit card customers in *Szetela,* AT&T's subscribers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

(2) Impairment of Statutory Rights

The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable, and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra,* 24 Cal.4th at p. 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90; *Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at p. 317 [UCL]; *Broughton v. Cigna Healthplans, supra,* 21 Cal.4th at p. 1084 [CLRA].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90*; Armendariz, supra,* 24 Cal.4th at pp. 99-104.) In *Armendariz,* the claimant/employees sued for sexual

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9 Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szeleta, supra*, 97 Cal.App.4th at p. 1096.)

harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees--recovery that would otherwise have been available under FEHA. The Supreme Court held that the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1539-1540 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir. 1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

Plaintiffs apparently rely upon this principle in emphasizing that consumer class actions are given statutory protection. Under the CLRA, class actions are specifically permitted (Civ. Code, §§ 1752, 1781), and any purported contractual waiver of rights granted by the CLRA is invalid (Civ. Code, § 1751). Also, at the time of the events here, the UCL allowed consumers to redress unfair business practices through private attorney general actions. (Bus. & Prof. Code, § 17204; see fn. 4, *ante*.)

The *Szeleta* court apparently relied upon this principle, too, in finding that the contractual ban on class arbitration violates public policy. The *Szeleta* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a 'get out of jail free' card while compromising important consumer rights." (*Szeleta*, *supra*, 97 Cal.App.4th at p. 1101.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices.

(*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL and CLRA are arbitrable even though such claims vindicate important statutory rights. What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held permissible when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v.Superior Court* (1982) 31 Cal.3d 584, 609-614, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at pp. 318-319.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration. Arbitration is meant to resolve private disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at p. 1080.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." (*Iberia Credit Bureau, Inc. v. Cingular Wireless* (5th Cir. 2004) 379 F.3d 159, 174.)

C. Other Claims of Unconscionability

The cross-appeal by plaintiffs requires that we examine the other claims of unconscionability to determine whether the trial court's order denying arbitration may be affirmed on some other ground. We conclude that the arbitration clause is not substantively unconscionable in any respect.

(1) Mutuality

The early versions of the arbitration clause provided in pertinent part as follows: "Binding Arbitration. This provision is intended to be interpreted broadly to encompass all disputes or claims arising out of our relationship. Any dispute or claim made *by you against us* . . . arising out of or relating to this Agreement . . . (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such a court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us." (Italics added.)[10]

Plaintiffs focus on the phrase "any dispute or claim made *by you against us*" to assert that the arbitration clause requires only the customer to arbitrate disputes, leaving AT&T free to bring its claims to court. From this reading of the arbitration clause, plaintiffs contend the arbitration clause lacks mutuality.

We cannot agree with plaintiffs' interpretation of the arbitration clause. The phrase in question seems to be in the nature of an alert to the customer that the customer's claims will be arbitrated; it does not exclude AT&T's own claims from arbitration. Indeed, other language in the arbitration clause indicates that AT&T's claims, too, will be arbitrated. The exception for debt collection states that "you *or we* may choose to pursue [debt collection] claims in court …." (Italics added.) The words "or we" would be unnecessary if all of AT&T's claims could be litigated. Moreover, language later in the clause states: "By this agreement, both you and we are waiving certain rights to litigate disputes in court." This language confirms that the obligation to arbitrate is mutual.

(2) Cost Sharing

Plaintiffs argue that the early two-tiered and later three-tiered arrangements for allocation of costs are unconscionable, because the customer faces the possibility of substantial fees. We cannot agree.

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10 The later version omits the italicized phrase.

First, we reject plaintiffs' implicit assertion that consumers cannot be required to pay any costs of arbitration. Plaintiffs rely on *Armendariz, supra,* 24 Cal.4th 83, in which the Supreme Court held that when an employer imposes mandatory arbitration as a condition of employment, the employee cannot be required to bear any type of expense that is unique to arbitration and that the employee would not have to bear, were he free to bring his case to court. (*Id*. at pp. 107-113.) Accordingly, the court interpreted the contract that was otherwise silent on the issue to mean that the employer must bear all costs of arbitration. (*Id*. at p. 113.)

That "categorical" approach differs from the approach taken by the United States Supreme Court in a consumer arbitration case, *Green Tree Fin. Corp.-Ala. v. Randolph, supra,* 531 U.S. 79. In the face of a silent agreement, the court held that a party could seek to invalidate an arbitration agreement on the ground that the costs of arbitration would be "prohibitively expensive," but the consumer in that case failed to prove the likelihood that the costs would be so. (531 U.S. at pp. 90, 92.) Subsequent decisions have characterized the *Green Tree* approach as necessitating a case-by-case analysis. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at p. 96.)**11**

The California Supreme Court has not yet ruled on the allocation of costs in a consumer arbitration, but we have concluded that the case-by-case approach should be used in consumer cases. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at pp. 96-98.) In *Guitierrez,* the claimant established an inability to pay the up-front administrative fees, and we held the fee division provision unconscionable where the arbitration agreement provided no avenue for relief from unaffordable fees. (*Id*. at pp. 89-92.) The present case is markedly different. Plaintiffs here have made no showing that the costs of arbitration would be prohibitively expensive. In fact, the arbitration clause limits a customer's total costs to $25 on a claim under $1,000, and the trial court found that $25 is equivalent to the filing fee in small claims court. Only on claims in excess of $75,000 (or

$1,000 under the earlier version) is there a chance that the customer will be ordered to pay costs of arbitration above what the customer would pay to bring a lawsuit. Yet, because we have concluded that the arbitration must proceed on an individual basis, there is no discernible possibility that any of the plaintiffs would have a claim for recovery of an early termination fee in such large amounts. In any event, in a consumer arbitration proceeding, a consumer who can establish indigency is entitled to a waiver of all costs. (Code Civ. Proc., § 1284.3, subd. (b).) We find nothing overly harsh or unfair in the provision relating to costs in arbitration.

(3) Confidentiality

The early version of the arbitration clause contained a provision requiring the parties to keep confidential the outcome of any arbitration proceeding. That confidentiality provision was entirely omitted from the later version in 2003. Even assuming arguendo that the confidentiality provision is unconscionable, we agree with AT&T that the provision is readily severable from the remainder of the arbitration agreement.

The trial court has authority to sever an unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ. Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at pp. 1074-1075.) "If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra,* 24 Cal.4th at p. 124.) Here, the confidentiality provision is a single, discrete provision that is not integral to the arbitration agreement. The offending provision can be stricken without affecting the rest of the arbitration agreement.

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11 In *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at pages 1081-1085, the California Supreme Court recognized the difference in the two approaches and affirmed its categorical approach in mandatory employment arbitration.

(4) Limitations Period

The later version of the arbitration agreement contains a provision that imposes a two-year limitation period on claims against AT&T, whether brought in court or in the arbitral forum. Plaintiffs contend that because this two-year limitations period shortens the three-year-period under the CLRA (Civ. Code, § 1783) and the four-year period under the UCL (Bus. & Prof. Code, § 17208), the provision is unconscionable.

The contractual provision shortening the limitation period was not placed in the wireless service agreement until 2003, and all of the lawsuits filed here were timely under the two-year limit. There is no justiciable controversy here.

In any event, the provision is not unconscionable. Parties may agree by contract to shorten the limitations period otherwise provided by the statute of limitations as long as the shortened period is itself reasonable. (*Beeson v. Schloss* (1920) 183 Cal. 618, 622; *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1548; *West v. Henderson*(1991) 227 Cal.App.3d 1578, 1585, 1588.) Plaintiffs rely on *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at page 1542, that held a one-year limitation period in an employment agreement, when taken with other unilateral restrictions on the employee's remedies, to be unconscionable. The limitation period here, of course, is two years, not one, and we have not found any other provision to be unduly harsh. Plaintiffs have made no showing that the two-year limit unreasonably forecloses relief.

(5) Neutral Arbitrator

Plaintiffs contend that because the arbitration is governed by the wireless industry arbitration rules there is a risk that the arbitrator will not be neutral. This lack of neutrality assertedly comes from the fact that the wireless industry arbitration rules call for selection of an arbitrator from a limited panel of telecommunications specialists. Plaintiffs reason that AT&T will have the benefit of being a "repeat player" in front of the telecommunications panel, gaining knowledge of individual arbitrators' style, preferences, and methods.

The trial court acknowledged the risk but found only minimal potential for harm to the customers because the customers retain the ability to go to small claims court. We agree. In any event, plaintiffs acknowledge that the method for selecting the arbitrator is not itself substantively unconscionable; plaintiffs contend only that it is unconscionable when accompanied by the other unconscionable provisions. We do not find any other provision unconscionable.

DISPOSITION

The order denying the petition to compel arbitration is affirmed as to plaintiff Diane Tucker. As to the remaining plaintiffs, the order is reversed in part, and the trial court is directed to enter a new order compelling arbitration of the monetary claims on an individual basis. With respect to the claims for injunctive relief, the order denying arbitration is affirmed. The parties shall bear their own costs on appeal.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.